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6 CATHERINE GELLIS, individually and on  
7 behalf of all others similarly situated,  
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9 Plaintiff,

10 No. C 07-03679 JSW

11 v.  
12 VERIZON COMMUNICATIONS, INC., et al.,  
13

14 Defendants.  
15 \_\_\_\_\_/

16 **ORDER DENYING  
17 DEFENDANT'S MOTION TO  
18 DISMISS**

19 Now before the Court is the motion to dismiss filed by defendant Cellco Partnership,  
20 d/b/a Verizon Wireless (“Verizon Wireless”). Having carefully reviewed the parties’ papers  
21 and considered their arguments and relevant legal authority, the Court hereby DENIES Verizon  
22 Wireless’s motion to dismiss.<sup>1</sup>

23 **BACKGROUND**

24 Plaintiff Catherine Gellis (“Gellis”) brings this purported class action to challenge the  
25 late fees charged by Verizon Wireless. On September 21, 2006, Gellis entered into a two-year  
26 agreement with Verizon Wireless for mobile phone and data service. (First Amended  
27 Complaint (“FAC”), ¶ 12.) On that date, Gellis signed a short form agreement in which Gellis  
28 agreed to the current Verizon Wireless Customer Agreement, which in turn provides, in  
pertinent part:

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<sup>1</sup> Gellis requests that the Court take judicial notice of Verizon Wireless’s billing statement in which Verizon Wireless describes its late fee as liquidated damages. Although Verizon Wireless does not object, the Court finds that this document is not judicially noticeable under Federal Rule of Evidence 201. Accordingly, the Court DENIES Gellis’ request for judicial notice.

1 Payment is due in full as stated on your bill. IF WE DON'T RECEIVE  
2 PAYMENT IN FULL WHEN DUE, WE MAY, TO THE EXTENT PERMITTED  
3 BY LAW OF THE STATE OF THE BILLING ADDRESS WE HAVE ON FILE  
4 FOR YOU AT THE TIME, CHARGE A LATE FEE OF UP TO 1.5 PERCENT A  
5 MONTH (18% ANNUALLY), OR A FLAT \$5 A MONTH, WHICHEVER IS  
6 GREATER, ON UNPAID BALANCES.

7 (Id., ¶¶ 13, 14.)

8 In mid-December of 2006, Gellis received a bill from Verizon Wireless for \$131.59  
9 which was due by January 8, 2007. (Id., ¶ 17.) Gellis failed to pay the stated amount by the  
10 due date. (Id.) In mid-January of 2007, Gellis received another bill from Verizon Wireless.  
11 This bill was for \$268.49, which consisted of \$131.59 from the previous bill, a \$5 late fee, and  
12 \$131.90 for the next month's bill, and had a due date of "past due." (Id., ¶¶ 18, 19.) On  
13 January 17, 2007, Gellis paid the entire amount due. (Id., ¶ 19.)

14 Gellis alleges that \$5 late fee violates state law, and thus brings the following claims  
15 against Verizon Wireless: (1) violation of California Civil Code § 1671; (2) violation of  
16 California Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.*; (3) violation  
17 of California Business and Professions Code §§ 17200, *et seq.*; (4) unjust enrichment; and (5)  
18 declaratory relief. Verizon now moves to dismiss all of Gellis' claims on the grounds that such  
state law claims are preempted by section 332 of the Federal Communications Act, 47 U.S.C. §  
332(c)(3)(A) ("Section 332").

## 19 ANALYSIS

### 20 A. Legal Standards Applicable to Motions to Dismiss.

21 A motion to dismiss is proper under Federal Rule of Civil Procedure Rule 12(b)(6)  
22 where the pleadings fail to state a claim upon which relief can be granted. Fed. R. Civ. P.  
23 12(b)(6). Motions to dismiss are viewed with disfavor and are rarely granted. *Hall v. City of*  
24 *Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). "A complaint may be dismissed for one  
25 of two reasons: (1) lack of a cognizable theory or (2) insufficient facts under a cognizable legal  
26 claim." *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). On a  
27 motion to dismiss, the complaint is construed in the light most favorable to the non-moving  
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1 party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794  
2 F.2d 478, 481 (9th Cir. 1986).

3 **B. Gellis's State Law Claims are not Preempted.**

4 Section 332 provides in pertinent: “[N]o State or local government shall have any  
5 authority to regulate the entry of or the rates charged by commercial mobile service or any  
6 private mobile service, except that this paragraph shall not prohibit a State from regulating the  
7 other terms and conditions of commercial mobile services.” 47 U.S.C. § 332(c)(3)(A). Verizon  
8 Wireless argues that its late fee is a rate charged, or is part of its rate structure, and is thus  
9 preempted by Section 332. Gellis counters that the late fee constitutes liquidated damages and  
10 thus falls within the “other terms and conditions” which is not preempted by Section 332.

11 Rate is “[a]n amount paid or charged for a good or service.” *National Ass'n of State  
12 Util. Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1254 (11th Cir. 2006) (quoting Black's  
13 Law Dictionary 1268 (7th ed. 1999)). Verizon Wireless argues that its late fee is a “rate” under  
14 this definition because it is a charge for the service of extending credit to a customer beyond the  
15 due date for a bill. (Mot. at 7.) The only other federal court which has addressed this issue  
16 concluded that charges imposed when bills were not paid on time were a penalty for failing to  
17 submit timely payment, not a fee for use of cellular phones, and thus did not qualify as “rates.”  
18 *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp. 2d 421 (D. Md. 2000). In an  
19 analogous context, another court concluded that charging liquidated damages for early  
20 termination of service was a “term and condition,” rather than a “rate,” under Section 332.  
21 Therefore, the court held that the state law claims challenging the early termination fee were not  
22 preempted. *Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 713, 715 (S.D. Tex.  
23 1996); *see also Phillips v. AT&T Wireless*, 2004 WL 1737385, \*10 (S.D. Iowa, July 29, 2004)  
24 (finding that early termination fee was not a “rate” but was an “other term or condition”).

25 Verizon Wireless's reliance on *Gilmore v. Southwestern Bell Mobile System, Inc.*, 156 F.  
26 Supp. 2d 916 (N.D. Ill. 2001), is misplaced. In *Gilmore*, the court held that state law claims  
27 challenging a wireless carrier's “Corporate Account Administrative Fee” were preempted. *Id.*  
28 at 924-25. However, in that case, the plaintiff did not allege that the fee at issue was a charge

1 for something other than the provision of services. *Id.* at 923 n.8. Moreover, the court found  
2 that the plaintiff's allegations "explicitly raise[d] the issue of whether it received sufficient  
3 services in return for the [f]ee." *Id.* at 924. Consequently, the court found that the plaintiff's  
4 claims raised a rate issue. *Id.* In contrast, here, Gellis specifically alleges that the fee was  
5 imposed as a penalty, not as a charge in return for services she obtained. Therefore, the Court  
6 rejects Verizon Wireless's argument, and finds that the late fee is not charged in exchange for  
7 providing any service, but instead, is imposed as a penalty for failing to pay bills on time.

8 Nor does Verizon Wireless' argument that the late fee was part of the company's rate  
9 structure fare any better. In reliance on *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681  
10 (E.D. Mich. 1999), Verizon Wireless argues that a state law regulates rates when it seeks to  
11 regulate how a carrier recovers its costs of doing business. According to Verizon Wireless, it  
12 incurs costs when customers fail to pay their bills on time and the state law claims challenging  
13 its late fee impermissibly interfere with Verizon Wireless's decision regarding how it seeks to  
14 recover these costs. (Mot. at 13-14.)

15 In *Kiefer*, the plaintiff alleged that a company's late fee was unjust and unreasonable  
16 pursuant to Section 201(b) of the Federal Communications Act.<sup>2</sup> *Kiefer*, 50 F. Supp. 2d at 681.  
17 The court found that, under the doctrine of primary jurisdiction, the plaintiff's Section 201(b)  
18 claims should be referred to the Federal Communications Commission to determine whether the  
19 defendant's practice violated federal law. *Id.* The court rejected the plaintiff's argument that  
20 the late fee should be construed as a liquidated damage term and condition, "rather than as a  
21 'charge or practice' whose reasonableness is to be assessed under Section 201(b)" because the  
22 plaintiff's complaint asserted Section 201(b) reasonableness claims. *Id.* at 685. The court  
23 further reasoned that the late payment charge at issue was part of the overall rate structure and  
24 not merely a "term and condition" of the parties' service contract. The court found:  
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27 <sup>2</sup> Section 201(b) of the Federal Communications Act provides in pertinent part: "All  
28 charges, practices, classifications, and regulations for and in connection with such  
communication service, shall be just and reasonable, and any such charge, practice,  
classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47  
U.S.C. § 201(b).

1 Plaintiff's argument ignores the fact that a service provider's overall rate structure  
2 can take several forms; *i.e.*, it can spread the costs of untimely payments among  
3 its customers by charging everyone an increased rate, or it can include in its  
4 overall rate structure a separate charge for untimely payments that are to be  
5 imposed solely on those customers who fail to timely pay their bills. Defendant  
6 chose the latter of these two options to be included in its overall rate structure.

7 *Id.* at 865.

8 Significantly, Section 201(b) is broader than Section 322. It covers all "charges" and  
9 "practices," rather than just "rates." Undoubtedly, the late fee at issue here would constitute a  
10 "charge" under Section 201(b). The issue here, however, is whether the fee qualifies as a "rate"  
11 under Section 322. The Court thus finds the reasoning in *Kieffer* inapposite.

12 The court in *Phillips* rejected an argument similar to the one proffered by Verizon  
13 Wireless when it determined that an early termination fee was not a "rate." The court held that  
14 although the wireless carrier made a compelling argument that its early termination fee was an  
15 integral party of its rate structure and thus any challenge to those fees was a challenge to its  
16 rates, "rate" must be narrowly defined. *Phillips*, 2004 WL 1737385, \*10. Otherwise, if rates  
17 were construed as broadly as the defendants urged, "there [would be] no ability to draw a line  
18 between economic elements of the rate structure and normal costs of operating a  
19 telecommunications business that have no greater significance than as factors to be considered  
20 in determining what will ultimately be required of rates to provide a reasonable return on the  
21 business investment." *Id.*; *cf. National Ass'n of State Util. Consumer Advocates*, 457 F.3d at  
22 1255-56 (concluding "[t]hat the prohibition or requirement of a line item has some effect on the  
23 charge to the consumer does not necessarily place a regulation within the meaning of 'rates' and  
24 outside the ambit of state regulation of 'other terms and conditions.' ... The inclusion of the  
25 specific component[] ... 'rate structures' within the general term 'rates' does not magically  
26 expand the ... statutory language ....").

27 The Court agrees with the reasoning in *Phillips* and finds that the term "rate" must be  
28 construed narrowly. Assuming that Verizon Wireless does incur costs when customers fail to  
pay their bills on time, the company chose to recover such costs through imposing a late fee  
unrelated to the provision of any services, as opposed to raising its rates generally. If the Court  
adopted Verizon Wireless's reasoning, any charge imposed by a wireless carrier to recover

1 costs and make a profit would qualify as a “rate,” regardless of whether it was imposed in  
2 exchange for providing service or not. Although Section 332 could have preempted the  
3 regulation of any “charge,” it only preempts the regulation of “rates.” Therefore, the Court  
4 finds that Gellis’s state law claims challenging Verizon Wireless’s late fee do not challenge the  
5 company’s “rates,” and thus are not preempted by Section 332.

6 **CONCLUSION**

7 For the foregoing reasons, the Court DENIES Verizon Wireless’s motion to dismiss.

8 **IT IS SO ORDERED.**

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10 Dated: November 5, 2007

*Jeffrey S. White*  
11 JEFFREY S. WHITE  
12 UNITED STATES DISTRICT JUDGE  
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